

SHEDRICK L. HENRY,	)	No. C 15-4550 RMW (PR)
	)	
Petitioner,	)	<b>ORDER OF DISMISSAL</b>
	)	
v.	)	
	)	
	)	
SUZANNE M. PERRY, Warden,	)	
	)	
Respondent.	)	

As the court previously advised petitioner, prisoners in state custody who wish to collaterally challenge either the fact or length of their confinement in federal habeas corpus proceedings are first required to exhaust state judicial remedies, either on direct appeal or through collateral proceedings, by presenting the highest state court available with a fair opportunity to rule on the merits of each and every claim the prisoners seek to raise in federal court. 28 U.S.C.

§ 2254(b)-(c). The exhaustion-of-state-remedies doctrine reflects a policy of federal-state comity to give the state “the initial ‘opportunity to pass upon and correct alleged violations of its prisoners’ federal rights.’” Picard v. Connor, 404 U.S. 270, 275 (1971) (citations omitted). The exhaustion requirement is satisfied only if the federal claim has been “fairly presented” to the state courts. See id.; Peterson v. Lampert, 319 F.3d 1153, 1155-56 (9th Cir. 2003) (en banc). The state's highest court must be given an opportunity to rule on the claims even if review is discretionary. See O’Sullivan v. Boerckel, 526 U.S. 838, 845 (1999) (petitioner must invoke “one complete round of the State’s established appellate review process.”). A federal district court must dismiss a federal habeas petition containing any claim as to which state remedies have not been exhausted. See Rhines v. Weber, 544 U.S. 269, 273 (2005).

Petitioner requests that the court stay and hold his petition in abeyance while petitioner returns to exhaust his claims in state court. While the United States Supreme Court has held that a district court may stay mixed habeas petitions to allow the petitioner to exhaust in state court, see Rhines, 544 U.S. at 277-78, a district court does not have discretion to stay a petition containing only unexhausted claims, see Rasberry v. Garcia, 448 F.3d 1150, 1154 (9th Cir. 2006). Cf. James v. Pliler, 269 F.3d 1124, 1126-27 (citing Calderon v. United States District Court (Taylor), 134 F.3d 981, 988 (9th Cir. 1998)) (“In Taylor, we held that a district court may, in its discretion, allow a petitioner to amend a mixed petition by deleting the unexhausted claims, hold the exhausted claims in abeyance until the unexhausted claims are exhausted, and then allow the petitioner to amend the stayed petition to add the now exhausted claims.”). Here, petitioner conceded that he had not presented any of his claims to the California Supreme Court and thus, his petition is wholly unexhausted. The court cannot hold a fully unexhausted petition in abeyance.

Because it is clear that petitioner has not fairly presented his claims in the underlying federal habeas corpus petition to the highest state court, the court DISMISSES the petition without prejudice for failure to exhaust.

The federal rules governing habeas cases brought by state prisoners require a district court that denies a habeas petition to grant or deny a certificate of appealability (“COA”) in its ruling. See Rule 11(a), Rules Governing § 2254 Cases, 28 U.S.C. foll. § 2254. Petitioner has not shown

1 “that jurists of reason would find it debatable whether the district court was correct in its  
2 procedural ruling.” Slack v. McDaniel, 529 U.S. 473, 484 (2000). Accordingly, a COA is  
3 DENIED.

4 The Clerk shall terminate all pending motions and close the file.

5 IT IS SO ORDERED.

6 DATED: 2/9/2016

  
RONALD M. WHYTE  
United States District Judge